STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 27, 2010
v	No. 291241 Wayne Circuit Court
LEROY PHILLIP-CORYA TOWNSEND, Defendant-Appellant.	LC No. 08-007114-FC

Before: SHAPIRO, P.J., and SAAD and SERVITTO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts or armed robbery, MCL 750.529, and one count each of first-degree home invasion, MCL 750.110a(2), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a third habitual offender, MCL 769.11, to concurrent prison terms of 5 to 40 years for the felon-in-possession conviction and 24 to 40 years each for the armed robbery and home invasion convictions, to be served consecutive to a five-year prison term for the felony-firearm conviction. We affirm defendant's convictions, but remand for entry of an amended judgment of sentence reflecting a ten-year maximum sentence for defendant's felon-in-possession conviction.

Defendant argues that reversal is required because he did not receive effective assistance of counsel at trial. We disagree. Because defendant did not raise this issue in a motion for a new trial or request for a *Ginther*[1] hearing, our review is limited to errors apparent from the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007); *People v Plummer*, 229 Mich App 293, 308; 581 NW2d 753 (1998). A defendant claiming ineffective assistance of counsel bears the burden of showing both deficient performance and prejudice. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). "[D]efendant must demonstrate that counsel's performance was deficient in that it fell below an objective standard of professional reasonableness, and that it is reasonably probable that, but for counsel's ineffective assistance, the result of the proceeding would have been different." *Jordan*, 275 Mich App at 667.

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Defendant must overcome a strong presumption that counsel engaged in sound trial strategy. *Id.* at 667-668.

Defendant first argues that defense counsel was ineffective for not "reminding" the trial court to give a cautionary instruction in relation to other acts evidence that was admitted under MRE 404(b)(1). Defendant challenged the admissibility of the other acts evidence at a pretrial hearing. The trial court ruled that the evidence was admissible and stated that it would give a cautionary instruction at trial advising the jury of the limited purpose of the evidence. At trial, however, a cautionary instruction was neither requested nor given.

The trial court incorrectly remarked at the pretrial hearing that a cautionary instruction was required to be given. Such an instruction is required with respect to other acts evidence only if requested by the defendant. MRE 105; *People v Sabin* (*After Remand*), 463 Mich 43, 56; 614 NW2d 888 (2000). The decision to forego a limiting instruction may be sound trial strategy. See *People v Schenk*, 477 Mich 1061; 728 NW2d 458 (2007).

In this case, Latashia Caine testified at trial that a prior robbery was committed by a masked man having the same physical characteristics and wearing the same jacket as the man who broke into her townhouse on January 2, 2007, who she identified as defendant. In this case, however, unlike with the prior act, the prosecutor also had DNA evidence linking defendant to the charged January 2, 2007, break-in. Defense counsel may have reasonably concluded that defendant's questionable identification as the person who committed the prior act, which was unsupported by any independent or corroborative physical evidence, rendered the need for a cautionary instruction unnecessary. Counsel also may have concluded that a cautionary instruction might have damaged the defense by highlighting a permissive use of the other acts evidence. Defendant has not overcome the presumption that defense counsel declined to request a cautionary instruction at trial as a matter of trial strategy.

Further, even if counsel's failure to request a cautionary instruction could not be attributed to trial strategy, and could be considered objectively unreasonable, defendant has not demonstrated the requisite prejudice to succeed on a claim of ineffective assistance of counsel. Contrary to defendant's argument on appeal, the record does not reflect a risk that the jury convicted him because it believed he was a "bad man," as opposed to relying on the strength of the evidence. The only circumstance in which the jury reasonably would have considered the prior act is if it had found that he committed the charged January 2, 2007, break-in on the basis of the strength of the identification evidence presented at trial. It is not reasonably probable that the result of the trial would have been different had a cautionary instruction been given.

Defendant also argues that defense counsel was ineffective for not challenging Caine's in-court identification as the product of an unduly suggestive pretrial identification procedure. Defendant argues that Caine's identification was tainted by her observation of him on a "Crime Stoppers" television show, after a police officer alerted Caine that defendant would be profiled on that show. Even assuming that these circumstances might have a bearing on whether there was an invalid pretrial identification procedure, see *People v Gray*, 457 Mich 107, 111-114; 577 NW2d 92 (1998), suppression of a victim's in-court identification is not required if there is an independent basis for the in-court identification. *Id.* at 114-115. "The need to establish an independent basis for an in-court identification arises where the pretrial identification is tainted by improper procedure or is unduly suggestive." *People v Barclay*, 208 Mich App 670, 675; 528

NW2d 842 (1995). Several factors should be weighed in determining whether an independent basis exists, but the totality of the circumstances is considered. *People v Davis*, 241 Mich App 697, 702-703; 617 NW2d 381 (2000). The identification itself, however, need not be based on facial characteristics of the perpetrator. Rather, "height, weight and clothing are acceptable elements of identification." *Willis v Garrison*, 624 F2d 491, 494 (CA 4, 1980).

In this case, Caine's testimony indicated that she never saw the perpetrator without a mask and that her identification of defendant was based only on particular physical characteristics, such as his hazel-colored eyes, skin complexion, height, and body build. Defendant's argument does not address the limited nature of Caine's identification, and defendant wholly fails to address whether he could have succeeded in showing that there was no independent basis for her in-court identification testimony. Absent such a showing, defendant cannot demonstrate the requisite prejudice to establish a claim that trial counsel was ineffective.

Furthermore, considering the DNA evidence that linked defendant to the charged crimes, the probative value of Caine's identification testimony lies in the consistency between defendant's physical appearance and the man described by Caine. The evidence regarding the "Crime Stoppers" show permitted trial counsel to present his theory that there was sloppy police work and that defendant was a victim of an unfair process. Trial counsel asserted in closing argument that "[t]he process from arrest to either acquittal or conviction has to be fair. Now we think that we have the person that committed this crime. What do we do? We call Crime Stoppers. . . . We want to be on TV." Examined in this context, trial counsel's decision not to move to suppress Caine's in-court identification testimony and to instead use the circumstances surrounding the Crime Stoppers identification to argue that defendant was the victim of an unfair process appears to be a matter of reasonable trial strategy. Compare *People v Wilki*, 132 Mich App 140, 145; 347 NW32d 735 (1984) (counsel's decision not to request a lineup or move to suppress identification testimony was a matter of trial strategy where the complainant was thoroughly cross-examined regarding the identification and suggestiveness was argued to the jury). Defendant has not met his burden of showing that counsel's performance was deficient, or that he was prejudiced by counsel's failure to move to suppress Caine's in-court identification testimony at trial.

It is unclear whether defendant claims that defense counsel should have also moved to suppress the in-court identification testimony of Caine's teenaged son. Based on defendant's limited argument, and considering that Caine's son's identification testimony was based on the same types of physical characteristics described by Caine, we are not persuaded that defendant can establish an ineffective assistance of counsel claim with respect to this issue.

Lastly, we agree with defendant that his 40-year maximum sentence for his felon-in-possession conviction is plain error entitling him to sentencing relief. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). Because defendant was sentenced as a third habitual offender, the trial court was authorized to sentence him "to imprisonment for a maximum term that is not more than twice the longest term prescribed by law for a first conviction of that offense." MCL 769.11(1)(a). A conviction for felon in possession of a firearm is punishable "by imprisonment for not more than 5 years." MCL 750.224f(3). Thus, the trial court was authorized to impose an enhanced maximum sentence of no more than ten years for defendant's felon-in-possession conviction. A sentence is invalid only to the extent of the "unlawful excess." MCL 769.24; see also *People v Thomas*, 447 Mich 390, 393; 523 NW2d 215 (1994). Therefore,

only the excess 30-year portion of defendant's maximum sentence is invalid. Accordingly, we remand for amendment of defendant's judgment of sentence to reflect a maximum sentence of ten years for the felon-in-possession conviction.

Affirmed in part and remanded for entry of an amended judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Henry William Saad
/s/ Deborah A. Servitto